FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1245

JOSEPH CRISTIN,

Appellant/Cross-Appellee,

v.

EVERGLADES CORRECTIONAL INSTITUTION and DIVISION OF RISK MANAGEMENT, STATE OF FLORIDA,

Appellees/Cross-Appellants.

On appeal from an order of the Office of the Judges of Compensation Claims.
Wilbur W. Anderson, Judge.

Date of Accident: April 30, 2014.

December 31, 2020

JAY, J.

In this workers' compensation case, Claimant seeks reversal of the Judge of Compensation Claim's (JCC's) order denying compensability of his workplace fall based on his acceptance of the opinions of an expert medical advisor (EMA). Claimant raises multiple issues on appeal, but we find merit regarding only one: Whether the JCC erred by finding that, as both gatekeeper of the

evidence and factfinder, he could not address Claimant's *Daubert*[1] objection to the medical opinions of the Employer/Carrier's (E/C's) independent medical examiner (IME), which allowed for the appointment of the EMA. We conclude that the JCC's refusal to perform its gatekeeping function—based on the assumption that its factfinding function precluded it from doing so—is legal error constituting an abuse of discretion. The error is not harmless, because the appointment of the EMA was primarily based on a conflict between the Claimant's IME and the opinion subject to the *Daubert* challenge. Moreover, the error was not harmless because even if there were enough basis to still appoint an EMA—as the dissent asserts—an erroneous admission of some of the IME's opinion would affect the conclusive presumption given to the EMA's opinion by the JCC.

We in turn reverse the compensation order and remand for proper consideration of the Claimant's *Daubert* objection to the opinion testimony of the E/C's IME. On the cross-appeal, the JCC did not abuse its discretion in denying without prejudice the E/C's motion to strike the Claimant's *Daubert* objection (which was followed by the Claimant's motion to exclude). We otherwise do not need to reach the correctness of the E/C's timeliness and specificity objections because the JCC did not address those in its denial of the motion to exclude.

I.

Facts

On April 30, 2014, Claimant, a correctional officer, fell at work, sustaining a serious head injury. On the way to the hospital, he suffered a seizure. He was hospitalized for ten days for subarachnoid and subdural hematomas, and a right cerebellar contusion with associated seizure disorder. He did not return to work for several months. In November 2014, after his anti-seizure medication was discontinued, he had a seizure at home and was taken to the emergency room.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

When the E/C denied the occurrence of a compensable workplace injury, Claimant filed a petition for benefits, seeking a determination of compensability together with past and future medical expenses and other associated benefits. As their major defenses, the E/C asserted that Claimant's employment was not the major contributing cause of his injuries, and that his original fall and subsequent seizure were the result of an idiopathic or preexisting condition and did not otherwise arise out of his employment. Claimant asserted that he lost consciousness before he fell, and the cause of this loss of consciousness or syncopal episode is in dispute, but ultimately unknown. And, because he was in the course and scope of his employment at the time of his fall, the accident is presumed compensable.

The JCC found that the evidence showed Claimant was diagnosed with prostate cancer approximately two years before his fall at work. Claimant rejected his doctor's traditional treatment recommendations and opted to undergo an alternate holistic treatment known as Gerson therapy. This therapy is a regimen of a specific vegan diet, a large number of nutritional supplements, and two or more daily coffee enemas. According to the monitoring physician's records, Claimant lost almost thirty pounds under the Gerson regimen and complained of low energy and fatigue. But Claimant later testified that he actually "felt like superman" with "energy all the time."

On the day he fell at work, Claimant performed his usual morning routine under the Gerson regimen. Later that morning, he was teaching a class of correctional officer recruits, when Warden Acosta and Colonel Lugo, a senior correctional officer, came into the classroom for what the warden described as a routine visit that also included a discussion of the use of cell phones with the new recruits. When the warden began addressing the recruits, Colonel Lugo asked Claimant to step outside with him. Colonel Lugo testified that the purpose of his request was to have a friendly conversation with Claimant—not to reprimand him. He stated he did not recall any disciplinary problems with Claimant. In contrast, Claimant testified that the warden was very upset, that Colonel Lugo's manner was condescending, and that he felt responsible for the breach of the rules on cell phone use. The two

walked down the hall to an empty classroom. Once inside this classroom, Claimant suddenly slumped against the concrete wall, fell backwards, and struck his head on the ceramic tile floor.

Medical Opinion Evidence

Dr. Nedd, Claimant's independent medical examiner (IME), is a board-certified neurologist who concentrates on closed-head trauma. Dr. Nedd testified that no preexisting condition explained Claimant's syncope (faint) on the day of the accident and that the etiology of the syncopal episode was unclear. Having no other explanation, Dr. Nedd suspected Claimant passed out due to stressors at work and described stress as a potential cause. He dismissed Claimant's adherence to the Gerson regimen as a cause.

In contrast, Dr. Fischer, the E/C's IME neurologist, opined that Claimant had "a vasodepressor syncopal episode, caused within reasonable medical probability by a hemodynamic state of volume depletion that was caused, in turn, by his use of frequent enemas, associated with substantial weight loss, fatigue, and being on medication for several months prior to the incident in question and which would engender a syncopal episode." As Dr. Fischer further explained, the "hemodynamic state" here was an instance of low blood pressure induced by volume depletion/dehydration related to the use of enemas—*i.e.*, the Gerson regimen treatment, which, according to Dr. Fischer, is not FDA-approved—and the medication prescribed by Claimant's primary physician for a prior diagnosis of hypertension. Dr. Fischer acknowledged that syncope can be the result of psychophysiological problems, but stated "that was not his problem."

Claimant's Daubert Objections

Dr. Fischer's deposition, initiated on May 1, 2017, was continued and completed on August 14, 2017. At the end of the May 1 proceeding, before the conclusion of the doctor's direct examination and the commencement of cross-examination, Claimant's attorney stated: "I just want to make note that I do have an objection to the reliability of the testimony, all the Daubert Objection across the board." One week after the continued deposition on August 14, Claimant filed an amendment to the

pretrial stipulation objecting to Dr. Fischer's testimony as "pure opinion" testimony that did not otherwise comply with section 90.702, Florida Statutes, or the standard of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In September 2017, the E/C filed a motion for the appointment of an EMA under section 440.13(9)(c), Florida Statutes (2015), based on the disagreement in the medical opinions between Dr. Nedd and Dr. Fischer. Two weeks later, the E/C filed a motion to strike Claimant's *Daubert* objections to Dr. Fischer's deposition testimony. Following a hearing on the motion, JCC Spangler denied the motion without prejudice, and found that the

> Daubert objection is preserved. However, claimant has not perfected the objection properly by filing an appropriate motion to limit or strike the allegedly objectional testimony which sets forth the basis of the objection. Unless same is filed the [*Daubert*] objection does not set forth sufficient grounds to sustain.

In March 2018, Claimant filed a motion to exclude Dr. Fischer's opinions. In the motion, Claimant argued that (1) Dr. Fischer, as a neurologist, was not qualified to testify as to dehydration or volume depletion; and (2) Dr. Fischer's testimony was pure opinion testimony based on unreliable methodology. Following a hearing, JCC Spangler denied the motion because the exclusion of the doctor's testimony, in a bench trial setting, is "not literally possible" where the JCC is both the trier of fact and the arbiter of the admissibility of the evidence. He also noted that the exclusion or striking of evidence is considered a drastic remedy under Florida Administrative Code Rule 60Q-6.125(1).

Expert Medical Advisor (EMA)

On April 3, 2018, JCC Spangler entered an order appointing Dr. Suite, a neurologist, as the EMA and requested that he respond to specific questions, including what caused Claimant's syncope on the day of his fall. Although Dr. Suite's written response indicated that Claimant had a vasovagal event (faint) likely caused by stress, in deposition, as found by JCC Anderson (the successor JCC), the

doctor opined that this event was more likely related to the Gerson regimen.

Final Hearing and Final Order

At a hearing held in November 2018, Claimant renewed his motion to exclude Dr. Fischer's testimony "preserving . . . objections for appeal, of course." JCC Anderson instructed Claimant that he would have to specify his objections to any depositions at the time of their submission. When the E/C submitted Dr. Fischer's deposition testimony at the February 6, 2019, final hearing, Claimant renewed his arguments "just [to] make sure that that is all preserved for appeal," and requested that his prior motion to exclude—and JCC Spangler's order denying the same—be added to the record. In the final order, JCC Anderson found no clear and convincing evidence to reject Dr. Suite's presumptively correct EMA opinion that the MCC of the syncopal event resulting in Claimant's injuries was malnutrition related to the Gerson regimen. He denied all benefits accordingly. This timely appeal followed.

II.

Generally, a JCC's decision whether to admit evidence is reviewed for abuse of discretion. *See King v. Auto Supply of Jupiter, Inc.*, 917 So. 2d 1015, 1017, 1020 (Fla. 1st DCA 2006) (holding that JCC did not abuse discretion when it admitted expert opinion testimony over an objection regarding the underlying data on which the expert relied). A JCC's statutory interpretation, however, is subject to de novo review. *See id.* at 1018 (explaining that because a determination of whether JCC erred in admitting testimony turns on interpretation of Florida Evidence Code, review is de novo); *see also Lombardi v. S. Wine & Spirits*, 890 So. 2d 1128, 1129 (Fla. 1st DCA 2004).

In 2013 the Legislature amended section 90.702 of the Florida Evidence Code to codify the standard for admissible expert testimony as established in *Daubert*, 509 U.S. at 579. The amended provision states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in

> determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
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> > (1) The testimony is based upon sufficient facts or data;
> >
> > (2) The testimony is the product of reliable principles and methods; and
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> > (3) The witness has applied the principles and methods reliably to the facts of the case.

In enacting this change, the Legislature made it clear that "pure opinion" testimony from an expert is not admissible. *See* Ch. 13-107, § 1, Laws of Fla. This Court previously confirmed that the *Daubert* standard applies in workers' compensation cases. *See Dep't of Corr. v. Junod*, 217 So. 3d 200, 204 n.4 (Fla. 1st DCA 2017); *see generally Giaimo v. Florida Autosport, Inc.*, 154 So. 3d 385 (Fla. 1st DCA 2014).

Furthermore, a JCC is required to apply the *Daubert* test, as codified in section 90.702, to a challenge to the admissibility of an expert opinion. *See Perry v. City of St. Petersburg*, 171 So. 3d 224, 225 (Fla. 1st DCA 2015) (holding JCC erred in determining that he was not required to apply analysis under § 90.702 to doctor's expert opinion and directing JCC to follow *Booker* on remand). As this Court explained in *Booker*,

> When engaging in a *Daubert* analysis, the judge's role is that of the evidentiary "gatekeeper," that is, the one who determines whether the expert's testimony meets the *Daubert* test. *See Daubert*, 509 U.S. at 597, 113 So. Ct. 2786. *See also Kumho Tire* [*Co., Ltd. v. Carmichael*, 526 U.S. 137, 152], 119 S. Ct. 1167 [(1999)]; [*General Elec. Co. v.*] *Joiner*, [522 U.S. 136, 142], 118 S. Ct. 512 [(1997)]. The purpose of the gatekeeping requirement is to ensure an expert "employs in the court room the same level of intellectual rigor that characterizes the practice of an

> expert in the relevant field." *Kumho Tire*, 526 U.S. at 152, 119 S. Ct. at 1167.

Booker v. Sumter Cnty. Sheriff's Office/N. Am. Risk Servs., 166 So. 3d 189, 192 (Fla. 1st DCA 2015) (discussing requirements to properly raise *Daubert* objection and establishing applicable *Daubert* test).

Citing the *Daubert* standard of section 90.702, Claimant sought below to exclude Dr. Fischer's opinion testimony, which not only supported the E/C's defenses, but also created the disagreement in medical opinion mandating the appointment of an EMA under section 440.13(9)(c), Florida Statutes (2013), which provides that an EMA shall be appointed where "there is disagreement in the opinions of the health care providers" and that the EMA's opinion is presumptively correct. Without Dr. Fischer's opinion testimony, the JCC would have had no authority to appoint an EMA. *See Miller Elec. Co. v. Oursler*, 113 So. 3d 1004, 1007–08 (Fla. 1st DCA 2013) (holding JCC committed reversible error by relying on inadmissible medical testimony to find disagreement in medical opinion that required appointment of EMA, and remanding for reconsideration of causation issue exclusive of EMA's medical opinion).

A JCC's finding that testimony is admissible under the *Daubert* standard set forth in section 90.702 is reviewed under an abuse of discretion standard. *See Kumho Tire*, 526 U.S. at 152; *King*, 917 So. 2d at 1017 (noting that JCC's decision to admit evidence reviewed for abuse of discretion). But here, neither JCC made an admissibility finding based on *Daubert*. When the E/C moved to strike Claimant's *Daubert* objection, JCC Spangler denied the motion because the objection, although preserved, had not yet been "perfected" with a detailed motion. Several months later, when Claimant filed a detailed motion citing grounds to exclude Dr. Fischer's opinion under *Daubert*, JCC Spangler indicated that he was prepared to rule on the merits. Although he ultimately denied the motion, he did not do so on the merits. Instead, he ruled that he could not exclude Dr. Fischer's testimony,

> [I]n that the undersigned being the trier of fact and the arbiter of the admissibility of the evidence is necessarily

> exposed to the testimony. Therefore, exclusion, in the bench trial setting, is not literally possible. The issue in all such matters is weight to be given to the testimony and whether the undersigned can make any finding of fact based on the testimony, not striking or excluding the evidence from the record.

We disagree and find that the initial JCC erred as a matter of law by failing to address Claimant's *Daubert* objections. And the successor JCC similarly erred by declining to apply a *Daubert* analysis when Claimant later renewed his objection.[2]

Federal courts have ruled that a trial court has broad discretion in determining *how* to perform its gatekeeper function addressing the admissibility of expert opinion testimony. *See, e.g.*, *Kumho Tire*, 526 U.S. at 152 (explaining "importance of *Daubert*'s gatekeeping requirement . . . to ensure the reliability and relevancy of expert testimony," but concluding "that the trial judge must have considerable leeway in deciding in a particular case *how* to go about determining whether particular expert testimony is reliable" (emphasis supplied)); *Club Car Inc v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004) (noting that a "trial court has broad discretion in determining how to perform its gatekeeper function"); *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) ("It is within the discretion of the trial court to determine *how* to perform its gatekeeping function under *Daubert*.").

But this does not mean that the trial court—even during a bench trial—has the discretion to decide not to perform the gatekeeper function at all. *See Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1336 (11th Cir. 2010) (noting generally that it is reversible error for a trial court to "abdicate [its] gatekeeper role and refuse to assess reliability"; "[A]t all times the district court must still determine the reliability of the opinion, not merely the qualifications of the expert who offers it"); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 & nn. 3–4 (11th Cir. 2005) (holding

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[2] Contrary to the E/C's argument on appeal, we also find that Claimant has preserved this issue for appellate review.

that when a trial court "disavow[s] its ability to handle [] *Daubert* issues," it "essentially abdicate[s] its gatekeeping role," which is "in itself an abuse of discretion"). As the Third Circuit explained, the trial court's gatekeeping responsibility under this rule "applies whether the trier of fact is a judge or a jury" and "[b]y using the term 'trier of fact,' rather than specifying judge or jury, [the rule] does not distinguish between proceedings." *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832 (3d Cir. 2020). Such a distinction makes no sense in the context of a workers' compensation case where the JCC is always both the gatekeeper of the evidence and the finder of fact. If we were to find otherwise, section 90.702 would have no application in the workers' compensation setting—a result contrary to established precedent and the language of the statute.

Furthermore, the JCC's gatekeeping function should not be an "empty exercise." *See Goebel*, 215 F.3d at 1088–89 (holding that the trial court, "when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper"). Once Claimant raised a *Daubert* objection to Dr. Fischer's expert opinion testimony, the JCCs had the responsibility to perform the necessary analysis, make relevant supporting findings of fact, and issue a ruling.

III.

We conclude that the JCCs abused their discretion as a matter of law by refusing to address Claimant's *Daubert* challenge to Dr. Fisher's opinion evidence. And because we agree with the *Goebel* court that "appellate courts are not well-suited to exercising the discretion" that the *Daubert* rule gives to the trial court, 215 F.3d at 1089, we decline to make our own determination on the merits of Claimant's *Daubert* objections, as the E/C request in their cross-appeal. That is to say, a proper assessment of the reliability of Dr. Fischer's opinion—which for the most part goes to the heart of the main point of disagreement in this case (the possible existence of a preexisting condition and whether it was part of the etiology of the syncope)—could require additional evidence and a hearing. Again, how that assessment is to be made is for the JCC—not us—to decide, provided a meaningful analysis is conducted.

Contrary to what the dissent suggests, the error here is not harmless. The Claimant may not have objected to some of Dr. Fischer's testimony—which would have left some conflict in place to support appointment of the EMA—but the admissibility of the objectionable opinion testimony would have affected the extent to which the EMA's opinion was presumptively correct. *See Lowe's Home Centers, Inc. v. Beekman*, 187 So. 3d 318, 322 (Fla. 1st DCA 2016) (holding that an EMA's opinion that exceeds the scope of a disagreement between IMEs still "would be admissible—but not presumptively correct"). "[T]he opinions intended to carry the presumption of correctness are *only* those that address already identified disagreements in medical opinions; all other medical opinions expressed by the EMA carry the same weight as that of an independent medical examiner or an authorized treating physician." *Id.*

The JCC concluded that the EMA's opinion was presumptively correct regarding the same issue on which Dr. Fischer offered the objectionable opinion, and ultimately denied compensability as a result. We cannot say with certainty that the JCC would have reached the same result had some of Dr. Fischer's testimony been excluded and the EMA's opinion not been deemed presumptively correct. We, therefore, REVERSE the order below and REMAND this matter to the JCC for an analysis and ruling on Claimant's *Daubert* objections to Dr. Fischer's testimony in accordance with this opinion and the *Daubert* test as set forth in *Booker*, 166 So. 3d at 193–95.

TANENBAUM, J., concurs; OSTERHAUS, J., concurs, in part, and dissents, in part, with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

OSTERHAUS, J., concurring in part and dissenting in part.

I would affirm all the issues here. Even agreeing with what the majority has said about the *Daubert*-related shortcomings in

this case, I don't think the JCC erred by appointing the expert medical advisor (EMA). As to the EMA's appointment, I would affirm because the E/C's motion raised sufficient non-*Daubert*-related grounds for the appointment that the Claimant didn't challenge.

The Claimant makes a "fruit of the poisonous tree"-type argument that the JCC erred by appointing the EMA in this case. *See Miller Elec. Co. v. Oursler*, 113 So. 3d 1004, 1007–08 (Fla. 1st DCA 2013) (rejecting reliance on inadmissible medical testimony as the basis for appointing an EMA). That is, Claimant didn't challenge the expert medical opinions offered by the EMA that the JCC ultimately relied upon in the Final Order. Rather, Claimant is arguing that there wasn't a qualifying disagreement between upstream health care experts sufficient to allow the JCC to appoint the EMA whose opinions were ultimately accepted.

But as I read the Workers' Compensation Law, the EMA-appointment statute lists grounds for appointing an EMA that go beyond whether there is a conflict between medical experts. The statute says:

> (c) *If there is disagreement in the opinions of the health care providers, if two health care providers disagree on medical evidence supporting the employee's complaints or the need for additional medical treatment, or if two health care providers disagree that the employee is able to return to work,* the department may, and the judge of compensation claims shall, upon his or her own motion or within 15 days after receipt of a written request by either the injured employee, the employer, or the carrier, order the injured employee to be evaluated by an expert medical advisor.

§ 440.13(9)(c), Fla. Stat. (emphasis added).

The Claimant's opposition to the EMA's appointment sought only to strike Dr. Fischer's medical opinions involving Claimant's fainting episode: "Wherefore, the Claimant respectfully requests that the [JCC] enter an order striking any *medical opinion* testimony of Dr. Fischer from use as evidence in this matter, based

on the lack of reliability of such opinion testimony." (Emphasis added.) Conversely, Claimant did not challenge the other medical evidence disagreements between health care providers that were cited in the E/C's motion. The E/C argued, for instance, that "[i]n addition to disagreement on the central [expert-opinion, cause-related] issue, the medical experts have other disagreements including diagnosis, the date of MMI and impairment rating." The E/C's motion also highlighted disagreements between the parties' IMEs about evidence such as whether there was "evidence [of] stress on the date of accident" and weight loss-, fatigue-, and blood pressure-change-related diagnostics. The motion cited differences about the underlying cancer evidence along the lines that Claimant's IME "was unaware that Claimant was following a holistic treatment" and "was under the impression Claimant's prostate cancer was in remission." In sum, there were basic disagreements on the medical evidence identified in the E/C's motion. So that, even if Dr. Fischer's medical opinions about the cause of Claimant's fainting episode had been stricken, other undisputed grounds in the E/C's motion supported the appointment of the EMA.

Because Claimant challenged only the use of Dr. Fischer's expert testimony, and did not challenge the existence of disagreements about the other medical evidence—whether Claimant had experienced workplace stress, weight loss, fatigue, blood pressure changes, cancer-remission status, etc.—I see no error in the JCC's decision to appoint the EMA under §440.13(9)(c). Nor do I see a problem with the JCC' s subsequently accepting the "well-reasoned and convincing" opinions of the EMA, which weren't challenged, to reach the conclusion that Claimant's fall and injuries weren't compensable. I would affirm.

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